IN THE

SUPREME COURT OF THE UNITED STATES

1975 TERM

NO. 75-5401

STEVE MENNA,

Petitioner,

vs.

NEW YORK.

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

WILLIAM E. HELLERSTEIN
The Legal Aid Society
15 Park Row
New York, New York 10038
[212] 577-3420
Counsel for Petitioner

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PETITION FOR A WRIT OF CERTIORARI
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TO: THE HONORABLE CHILF JUSTICE
AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED
STATES

Petitioner, Steve Menna, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New York Court of Appeals entered in this proceeding on June 11, 1975, which affirmed an order of the Appellate Division, Second Department entered on July 29, 1974, affirming a judgment of the Supreme Court, Kings County rendered April 11, 1972, convicting petitioner of criminal contempt.

OPINIONS BELOW

The opinion of the New York Court of Appeals is not yet officially reported and is set forth as Appendix A. The Appellate Division's order and memorandum of affirmance is officially reported at 45 A.D. 2d 1038 and is annexed as Appendix B. No opinion was written by the Supreme Court, Kings County.

JURISDICTION

The judgment of the New York Court of Appeals was entered on June 11, 1975. No application for an extension of time to file this petition has been made. The Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether petitioner's plea of guilty to criminal contempt, entered after denial of his motion to dismiss the indictment on double jeopardy grounds as he had previously been sentenced to thirty days imprisonment under an adjudication for the identical contempt constituted a waiver of his Fifth and Fourteenth Amendment rights against double jeopardy and to due process of law.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendments V and XIV.

STATEMENT OF THE CASE

In May, 1968, the Fourth Additional Kings County Grand Jury was impaneled to conduct an investigation into a conspiracy to commit murder and other crimes in Kings County in connection with an effort by unnamed persons to succeed Joseph Bonanno as head of an organized crime syndicate.

On November 7, 1968, petitioner was subpoenaed to testify before the Grand Jury and refused to answer questions put to him after a grant of immunity.

On March 18, 1969, the District Attorney moved to hold petitioner in contempt. Because petitioner was without counsel on November 7, the court afforded petitioner, now represented by counsel, an opportunity to return to the Grand Jury and testify. Petitioner again declined to testify and was adjudicated in contempt of court in violation of section 750 of the Judiciary Law. On March 21, 1969, petitioner declined the court's offer to allow him to purge himself of the contempt and was sentenced to thirty days in civil jail, which sentence he served.

On June 10, 1970, petitioner was indicted for his refusal to answer questions before the Grand Jury on November 7, 1968. On April 11, 1972, petitioner was arraigned on the indictment in Supreme Court, Kings County. Counsel immediately moved to dismiss the indictment on double jeopardy grounds, stating:

> Your Honor, my client was sentenced to 30 days, the Civil Prison, City of New York, in 1969. He served that time and was subsequently indicted under the charges existing before this court. I think the District Attorney concedes that he was sentenced to 30 days and he did that 30 days and, accordingly, your Honor, I will move to dismiss under the Section 40, Subdivision---Article 40 of the Criminal Procedure Law, Subdivisions 1, 2 and 3, on the grounds that there has been former jeopardy in this case.

THE COURT: Well counselor, you are citing the Criminal Procedure Law which was not in effect, and this took place in--prior to, sometime in 1970 or prior thereto.

MR. LAWSON: That's true, your Honor. But I believe the Criminal Procedure Law states that it relates back to events prior to September 1, 1971, when the Criminal Procedure Law was taken effect, or any case.

THE COURT: Well, regardless, the Court is constrained to deny the motion on the basis of the law as it exists today. Whether or not it will be changed or not by the Court of Appeals, this court at the present time has no way of knowing.

* * *

MR. LAWSON: I also want to raise Article 1, Section 6, of the New York State Constitution, regarding former jeopardy, and if I might, your Honor, mention the U.S. Constitution under Fourth, Fifth, Eighth and Fourteenth Amendments, with respect to particularly former jeopardy and with regard to cruel and unusual punishment which my client is subject to by having to face these charges, by his possibility of imprisonment for one year on these charges, when in fact he has already been sentenced to 30 days.

* * *

THE COURT: Well, on the basis of the law as it exists today--whether the Court of Appeals is going to reconsider its decision in People v. Columbo or not, this court has no way of knowing--but as the law stands today, as interpreted by our Court of Appeals, the Court has no other alternative but to deny the motion.

At this point, counsel advised the court that petitioner "offers to withdraw a prior plea of not guilty, to enter a plea of guilty to criminal contempt, class A misdemeanor," the crime charged in the indictment. The court accepted the plea and sentenced petitioner to a conditional discharge, the condition of discharge being that he be turned over to the federal authorities on the sentence he was then serving.

Subsequent to petitioner's plea and sentence, on December 29, 1972, the Court of Appeals, after two remands by this Court* overruled its earlier decision in the Colombo case and held that Columbo's indictment for criminal contempt, after he had already been punished for contempt under the Judiciary Law, was barred by the double jeopardy clause. People v. Columbo, 31 N.Y. 2d 947, 293 N.E. 2d 247 (1972).

Nonetheless, on July 29, 1974, the Appellate Division affirmed petitioner's conviction, citing its decision in People v. LaRuffa, 40 A.D. 2d 1022 as affirmed by the Court of Appeals. 34 N.Y. 2d 242, 313 N.E. 2d 332 (1974).

*Columbo v. New York, 400 U.S. 16 (1970); 405 U.S. 9 (1972).

Leave to appeal to the Court of Appeals was denied by Chief Judge Breitel. However, when the LaRuffa case was remanded by this Court to the Court of Appeals for reconsideration in light of Blackledge v. Perry, 417 U.S. 21 (1974) and Tollett v. Henderson, 411 U.S. 258 (1973), petitioner's motion for reargument of his application for leave to appeal was granted by Judge Breitel, on condition that the appeal be argued together with the LaRuffa case.

On June 11, 1975, the Court of Appeals affirmed petitioner's conviction, citing its decision in LaRuffa decided that day and stating that petitioner's decision to plead guilty after denial of his motion to dismiss the indictment on double jeopardy grounds constituted a waiver of his right later to raise the defense. Judge Fuchsberg, in a dissent joined by Judge Wachtler, maintained that "Menna's plea did not constitute a waiver of his constitutional right to claim double jeopardy, its practical result being "'to prevent a trial from taking place at all...'" citing Blackledge v. Perry, 417 U.S. at 31. App. A at 2.

REASONS FOR GRANTING THE WRIT

This case raises essentially the identical question presented in the petition for certiorari in LaRuffa v. New York (filed simultaneously herewith): whether petitioner's plea of guilty to criminal contempt arising out of the very same conduct for which he had already been sentenced to 30 days in civil jail under a prior contempt adjudication constituted a waiver of his double jeopardy claim and of his due process rights.

It was conceded below that petitioner's contempt conviction constituted double jeopardy but the majority of the Court of Appeals, on the authority of the LaRuffa decision rendered the same day held that petitioner's guilty plea waived his double jeopardy claim. The judgment in this case is thus premised on the Court of Appeals' erroneous interpretation of this Court's decision in Blackledge v. Perry, 417 U.S. 21 (1974), as Judges Fuchsberg and Wachtler, the dissenters in LaRuffa, maintained.

By holding that petitioner's plea of guilty waived his double jeopardy claim, the Court of Appeals, as in LaRuffa, erroneously minimized the distinction drawn in Blackledge between antecedent constitutional

violations and those which go to the very power of the State to bring a defendant into court to answer charges for which he had already been placed in jeopardy. In this case, petitioner had already served a 30 day sentence for his contemptuous conduct arising out of the Kings County Grand Jury proceedings of November 7, 1968. While at the time of his plea, the trial court concluded it was bound by the Court of Appeals' first decision in People v. Columbo, 25 N.Y. 2d 641, 254 N.E. 2d 340 (1969), that decision was overruled prior to petitioner's appeal to the Appellate Division and established that he had twiced been placed in jeopardy for the same crime. People v. Columbo, 31 N.Y. 2d 947, 293 N.E. 2d 247 (1972).

When petitioner's counsel, prior to plea, moved for a dismissal of the indictment on double jeopardy grounds he was challenging the State's right to haul petitioner into court for a second time on a charge for which he had already been convicted. For the Court of Appeals to hold that to preserve his double jeopardy claim, petitioner was required to subject himself to a trial runs counter to the very nature of the double jeopardy right as articulated by this Court:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Green v. United States, 355 U.S. 184, 187-88 (1957).

See also Robinson v. Neil, 409 U.S. 505 (1973). The Court is also respectfully referred to the discussion set forth in LaRuffa's petition for a writ of certiorari at pp. 4-7.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New York Court of Appeals.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
The Legal Aid Society
15 Park Row
New York, New York 10038

Counsel for Petitioner

State of New York
Court of Appeals

2 No. 163
The People &c.,
Respondent.
vs.
Steve Menna,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

* * * * * *

Order affirmed. Having knowingly and voluntarily chosen to plead guilty after denial of his motion to dismiss the indictment on the ground of double jeopardy, the defendant waived his right later to raise the defense and remains bound by his plea. (See People v. LaRuffa, decided herewith.) All concur except Fuchsberg, J., who dissents and votes to reverse in an opinion in which Wachtler, J., concurs.

Decided June 11, 1975

FUCHSBERG, J. (dissenting):

Menna, the defendant here, was adjudicated to be in civil contempt, in violation of Judiciary Law §750, for his refusal to testify before a grand jury, and sentenced to a jail term. This case stems from his subsequent indictment for criminal contempt arising out of precisely the same acts for which the civil contempt charge had been brought.

In People v. Colombo (25 NY 2d 641), a case very close on its facts to the one here, the indictment was dismissed on the ground of double jeopardy, but reinstated by the Appellate Division (32 AD 2d 812), whose decision, in turn, was upheld by our Court (25 NY 2d 641). Upon certiorari to the United States Supreme Court, it vacated and remanded "for further consideration in light of Waller v. Florida, 397 U.S. 387" (400 U.S. 16). We then adhered to our original decision (29 NY 2d 1). Again, certiorari was sought, and the Supreme Court vacated and remanded once more (405 U.S. 9). It was of the view that our Court had "misconcei[ved] the nature

of the contempt judgment. . . for purposes of the Double Jeopardy Clause". For the second time it remanded the case to us because of the possibility that the two separate charges of contempt might be "intertwined".

It was when Colombo was at that stage that Menna came up for trial on his criminal contempt indictment. He pleaded guilty, but not before his double jeopardy defense was summarily rejected by the trial court in the following language:

> "Well, on the basis of the law as it exists today--whether the Court of Appeals is going to reconsider its decision in People v. Colombo or not, this court has no way of knowing-- but as the law stands today, as interpreted by our Court of Appeals, the court has no other alternative but to deny the motion."

Some time after Menna's plea and sentence, our Court, acting for the third time in Colombo, reversed the latter's indictment as "barred by the double jeopardy clause". (31 NY 2d 947)

Under the circumstances, I believe Menna's plea did not constitute a waiver of his constitutional right to claim double jeopardy, its practical result being "to prevent a trial from taking place at all. . .".(Blackledge v. Perry, 417 US 21, 31; see also dissent in People v. La Ruffa, __ NY 2d __, decided herewith; United States v. Liguori, 430 F. 2d 842 [2d Cir.], cert. denied, 402 U.S. 948).

Accordingly, the order of the Appellate Division should be reversed and the indictment dismissed.

APPENDIX B

ORDER OF AFFIRMANCE OF THE APPELLATE DIVISION, SECOND DEPARTMENT

67 The People of the State of New York, Respondent, v. Steve Menna, Appellant.—Judgment of the Supreme Court, Kings County, rendered April 11, 1972, affirmed. (See *People* v. *La Ruffa*, 40 A D 2d 1022, affd. 34 N Y 2d 242, rearg. den. 34 N Y 2d 916.) Shapiro, Acting P. J., Cohalan, Brennan, Benjamin, and Mander, JJ., concur.

ORIGINAL
with
Affidavit of Service

ORIGINAL COPY IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-5401

STEVE MENNA,

Petitioner,

-v-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

EUGENE GOLD
District Attorney, Kings County
400 Municipal Building
Brooklyn, New York 11201
(212) 643-5100

RICHARD E. MISCHEL
Assistant District Attorney
of Counsel

Eugene Gold
District Attorney
Kings County

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PRELIMINARY STATEMENT

Petitioner seeks a writ of certiorari to review the judgment of the the New York Court of Appeals entered June 11, 1975, which affirmed an order of the Appellate Division, Second Department, rendered the 29th of July, 1974, affirming the judgment of the Supreme Court, Kings County rendered the 11th of April, 1972, convicting petitioner of the crime of Criminal Contempt and sentencing him thereon to a conditional discharge (Corso, J., at plea and sentence).

OPINIONS BELOW

The opinion of the New York Court of Appeals has not been officially reported.

The order and memorandum of affirmance of the Appellate Division, Second Department, is reported at 45 A D 2d 1038 and 358 N.Y.S. 2d 927 (1974).

No opinion was written by the Supreme Court, Kings County.

JURISDICTION

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether petitioner's counseled plea of guilty to the crime of Criminal Contempt, entered after the denial of his motion to dismiss the indictment on the ground that he had been twice placed in jeopardy, constituted a waiver of the defense of double jeoprdy.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendments V and XIV.

STATEMENT OF THE CASE

On the 7th of November, 1968, Steve Monna, petitioner herein, was summoned by the Fourth Additional Kings County Grand Jury, impaneled in May, 1968, to testify as part of a comprehensive investigation into a conspiracy to commit murder and other crimes in the County of Kings in connection with an effort by unnamed persons to succeed one Joseph Bonanno as head of an organized crime syndicate. Petitioner refused to answer the District Attorney's questions, notwithstanding the Grand Jury's grant of immunity.

On the 18th of March, 1969, petitioner was directed by Hon. Miles McDonald, Justice of the Supreme Court, Kings County, to return to the Grand Jury to testify. Upon returning, he again refused to answer questions similar to those previously asked by the District Attorney. Petitioner was adjudicated in contempt of court pursuant to Judiciary Law §750 and served a thirty-day sentence after he declined an opportunity to purge his contempt.

Petitioner was thereafter accused by Kings County Indictment No. 1063/1970 of the crime of Criminal Contempt for his refusal to testify on the 7th of November, 1968. On the 11th of April, 1972, defense counsel made an oral application before Hon. Joseph R. Corso, Justice of the Supreme Court, Kings County, to dismiss

the indictment pursuant to New York Criminal Procedure Law Article 40 ". . . on the grounds that there has been former jeopardy in this case . . ." (sic). The motion was denied, whereupon petitioner pled guilty to the indictment and was sentenced to a conditional discharge.

Subsequently, petitioner appealed to the Appellate Division, Second Department, claiming that his indictment for Criminal Contempt, after he had been punished for civil contempt pursuant to Judiciary Law §750, had twice placed him in jeopardy. The basis for this contention was found in People v. Colombo, 31 N Y 2d 947, 341 N.Y.S. 2d 97, 293 N.E. 2d 247 (1972), decided approximately eight and one-half months after petitioner's plea and sentence. The Appellate Division affirmed petitioner's conviction, citing People v. LaRuffa, 40 A D 2d 1022, 338 N.Y.S. 2d 957 (2d Dept. 1972), aff'd, 34 N Y 2d 242, 356 N.Y.S. 2d 849, 313 N.E. 2d 332 (1974), rearg. den., 34 N Y 2d 916 (1974).

Leave to appeal to the Court of Appeals was granted by Hon. Charles A. Breitel, Chief Judge, on the 27th of November, 1974, after this Court vacated and remanded LaRuffa, (419 U.S. 959 [1974]) for reconsideration in light of Blackledge v. Perry, 417 U.S. 21 (1974) and Tollett v. Henderson, 411 U.S. 258 (1973). Chief Judge Breitel granted this application on the condition that the Monna and LaRuffa cases be argued together.

On the 11th of June, 1975, the Court of Appeals affirmed petitioner's conviction and held that "[h]aving knowingly and voluntarily chosen to plead guilty after denial of his motion to dismiss the indictment on the ground of double jeopardy, the [petitioner] waived his right later to raise the defense and remains bound by his plea. (See People v. LaRuffa, decided herewith.)." Fuchsberg and Wachtler, JJ., dissented.

Petitioner now seeks a writ of certiorari to review that decision.

ARGUMENT

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PETITIONER'S DEFENSE OF DOUBLE JEOPARDY WAS WAIVED BY HIS COUNSELED PLEA OF GUILTY.

In affirming petitioner's conviction for Criminal Contempt on the authority of People v. LaRuffa, 37 N Y 2d 58, 371 N.Y.S. 2d 434 (1975), decided the same day, the Court of Appeals limited the scope of this Court's holding in Blackledge v. Perry, 417 U.S. 21 (1974), to its unique facts and correctly held that petitioner's counseled plea of guilty constituted a waiver of his double jeopardy defense. Accordingly, this petition for a writ of certiorari should be denied.

A close examination of Blackledge, supra, will reveal the inherent weaknesses in petitioner's assertion (see, Petitioner's Brief at 4-5) that the Court of Appeals ". . . erroneously minimized the distinction drawn in Blackledge between antecedent constitutional violations and those which go to the very power of the State to bring a defendant into court to answer charges for which he had already been placed in jeopardy." The appropriate constitutional distinction between Blackledge and the case at bar will also be revealed.

Two issues were presented in Blackledge, supra, namely: whether respondent Perry's due process or double jeopardy rights were violated by North Carolina's two-tiered appellate process: and whether respondent had waived those claims by his plea of guilty (417 U.S. at 24-25, 28-29).

In granting federal habeas corpus relief to respondent, this Court expressly declined to consider the merits of the double jeopardy claim (417 U.S. at 25, 31),* and held that it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him at the trial de novo (417 U.S. at 28-29). Such response ". . . operated to deprive [respondent] due process of law . . ." (417 U.S. at 30-31). This Court also held that a plea of guilty does not waive constitutional claims which challenge the very power of the State to bring a defendant into court to answer the charge[s] against him, as opposed to those claims relating to violations of constitutional rights antecedent to the entry of the plea (417 U.S. at 30).

At the core of this purely due process holding is this Court's narrow concern with actual or potential state vindictiveness and prosecutorial retaliation against an accused who has exercised a statutorily conferred right. (See, also, North Carolina v. Pearce, 395 U.S. 711 [1969].) The issue is the legitimacy of purpose of the State or prosecution at the inception of the criminal proceeding which, in the last analysis, challenges the court's jurisdiction to conduct those proceedings.

* Indeed, the double jeopardy claim was not available to respondent Perry (see 417 U.S. at 32 [Rehnquist, J., dissenting]).

[illegible] New York Criminal Procedure Law §40.20(2) (McKinney 1971), and [illegible] Chapman, 397 U.S. 436, 446 (1970) (Brennan, J., concurring

Further, since a plea of guilty does not waive jurisdictional defects, Perry's claim was preserved for appellate review (see, e.g., United States ex rel. Glenn v. McMann, 349 F. 2d 1018 [2d Cir. 1965]; Mahler v. United States, 333 F. 2d 472 [10th Cir. 1964], cert. den., 379 U.S. 993 [1965]; and United States v. Hetherington, 279 F. 2d 792 [7th Cir. 1960], cert. den. 364 U.S. 908 [1960]).

In the case at bar, there is no evidence, nor does petitioner argue to the contrary, that his indictment was the product of State vindictiveness or prosecutorial retaliation. To be sure, he was not punished for the exercise of a lawful right nor was the fear of punishment instilled in him for that reason. Rather, petitioner was legitimately indicted for violating State law as it then existed after he declined an offer to purge his contempt.*

Under these circumstances, it cannot be seriously argued that petitioner's indictment, after he was found in contempt of court by Mr. Justice McDonald, ". . . operated to deny [petitioner] due

* The law in New York underwent modification after petitioner pled guilty to the indictment (see, supra at 4). Only subsequent to petitioner's plea did the courts of New York State construe orders of contempt identical to that holding petitioner in contempt violative of the Double Jeopardy Clause. (See, e.g., Matter of Capio v. Justices of the Supreme Court, 41 A D 2d 235, 342 N.Y.S. 2d 100 [2d Dept. 1973], aff'd 34 N Y 2d 603, 354 N.Y.S. 2d 953, 310 N.E. 2d 547 [1974]; and People v. Matra, 42 A D 2d 865, 346 N.Y.S. 2d 872 [2d Dept. 1973].) A plea, otherwise voluntarily and intelligently entered, is not assailable because of subsequent changes in the law. (See, e.g., Brady v. United States, 397 U.S. 742, 757 [1970]; and McMann v. Richardson, 397 U.S. 759, 773 [1974].)

process of law . . ." (417 U.S. at 30-31). To be sure, "[n]ot all cases of double jeopardy, so called, so offend our concept of ordered liberty as to constitute a lack of due process of law . . ." (United States ex rel. Stevens v. Wilkins, 287 F. 2d 865, 868 [2d Cir. 1961], cert. den., 368 U.S. 853 [1961]. See Hoag v. New Jersey, 356 U.S. 468 [1958]).*

Respondents submit, therefore, that the State's purpose in indicting petitioner was, ab initio, legitimate; a State has the absolute right to prosecute a violator of the law notwithstanding the existence of a defense, e.g., double jeopardy, which, if affirmatively raised, may later bar that action. As such, a double jeopardy claim does not challenge the power of the State to initiate the criminal proceedings, but, rather, to maintain them.**

In short, Blackledge simply does not overrule the long line of decisions of the manifold jurisdictions which state that,

> "[t]he right not to be placed in jeopardy twice for the same offense is a personal right. It is an immunity to the citizens by our Constitution and may be waived. The plea of guilty by the defendant constitutes a waiver of this right." (Caballero v. Hudspeth, 114 F. 2d 545, 547 [10th Cir. 1940].)

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* See generally 16 A C.J.S. Constitutional Law §582 (1956) (citing cases).

** Similarly, the statute of limitations precludes the State from maintaining, as opposed to initiating, the criminal action if timely raised.

See, also, Cox v. State of Kansas, 456 F. 2d 1279 (10th Cir. 1972); Kistner v. United States, 332 F. 2d 978 (8th Cir. 1964); United States v. Hoyland, 264 F. 2d 346 (7th Cir. 1959), cert. den., 361 U.S. 845 (1959); Berg v. United States, 176 F. 2d 122 (9th Cir. 1949), cert. den. 338 U.S. 876 (1949); People v. Lynch, 40 A D 2d 856, 857 (2d Dept. 1972), and People ex rel. Williams v. Follette, 30 A D 2d 693 (2d Dept. 1968), aff'd, 24 N Y 2d 949 (1969). Cf. Biddinger v. Commissioner of Police of the City of New York, 245 U.S. 128, 135 (1971); Kepner v. United States, 195 U.S. 100, 131 (1904); United States v. Young, 503 F. 2d 1072, 1074 (2d Cir. 1974); United States v. Conley, 503 F. 2d 520, 521 (8th Cir. 1974); United States v. Scott, 464 F. 2d 832, 833 (D.C. Cir. 1972); United States v. Buonomo, 441 F. 2d 922 (7th Cir. 1970), cert. den., 404 U.S. 845 (1971); Grogan v. United States, 394 F. 2d 287 (5th Cir. 1967), cert. den., 393 U.S. 830 (1968); Kistner v. United States, supra; and People v. Cignarale, 110 N Y 23, 29 (1888).

Petitioner's reliance on Robinson v. Neil, 409 U.S. 505 (1973), as the LaRuffa majority correctly concluded, is misplaced. Robinson was solely concerned with the retroactivity of Waller v. Florida, 397 U.S. 387 (1970); the question of whether Robinson's plea of guilty waived the defense of double jeopardy was not litigated. Significantly, Robinson was followed by this Court's decision in Tollett v. Henderson, 411 U.S. 258 (1973), which reaffirmed the principle of

the so-called "Brady trilogy"*, concerning the legal consequence of pleading guilty (411 U.S. at 267). The major problem, however, which we perceive in petitioner's equation of double jeopardy and due process via the ". . . practical result[s]. . ." language found in Blackledge (417 U.S. at 31), also embraced by the dissenters in the Menna case, is the failure to account for the manner in which the results are effected. Blackledge has taught us that no legal formula is necessary to trigger and preserve a due process challenge; the law of the manifold jurisdictions, however, indicates that double jeopardy itself possesses no such talismanic powers.

Petitioner's reference to Mr. Justice Rehnquist's dissent in which he noted that Blackledge ". . . surely sounds in the language of double jeopardy, however it may be dressed in due process garb . . ." (417 U.S. at 35), is more significant for what petitioner has omitted than for what he has cited because Mr. Justice Rehnquist went on to say that,

> "I do not see why a constitutional claim the consequences of which make it the identical twin of double jeopardy may not, like double jeopardy, be waived by the person for whose benefit it is accorded." (417 U.S. at 35.)

Lastly, petitioner complains, at page 5 of his brief, that it is fundamentally unfair to require him to ". . . subject himself

* Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); and Parker v. North Carolina, 397 U.S. 790 (1970).

to a trial . . ." to ". . . preserve his double jeopardy claim . . .". The short answer to this complaint is that petitioner could have fully litigated this issue without going to trial by initiating a proceeding pursuant to Article 78 of the New York C.P.L.R. (see, e.g., Matter of State of New York v. King, 36 N Y 2d 59, 64, 364 N.Y.S. 2d 879, 883, 324 N.E. 2d 351, 354-355 [1975]).

Respondents therefore respectfully submit that, because the New York Court of Appeals correctly held that petitioner's counseled plea of guilty constituted a waiver of the defense of double jeopardy, and further, that the plea met the criteria articulated in Tollett v. Henderson, supra (People v. LaRuffa, 37 N Y 2d at p. 61, 37 N.Y.S. 2d at p. 436), petitioner's judgment of conviction was properly affirmed.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: Brooklyn, New York
October, 1975

Respectfully submitted,

EUGENE GOLD
District Attorney
Kings County

RICHARD E. MISCHEL
Assistant District Attorney
of Counsel